STATE BAR OF CALIFORNIA COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

MEETING SUMMARY – OPEN SESSION

Friday, December 12, 2003
(9:00 am - 4:55 pm)

VIDEO-CONFERENCE MEETING

SF–State Bar Office
180 Howard Street, Room 8-B
San Francisco, CA 94105

LA–State Bar Office
1149 So. Hill Street, Room 723
Los Angeles, CA 90015

MEMBERS PRESENT: Harry Sondheim (Chair); Karen Betzner; Linda Foy; Ed George; JoElla Julien; Stanley Lamport; Raul Martinez; Hon. Ignazio Ruvolo; Jerry Sapiro; Mark Tuft; and Paul Vapnek.

ALSO PRESENT: Jim Biernat (Bar Association of San Francisco Liaison); Randall Difuntorum (State Bar staff); Diane Karpman (Beverly Hills Bar Association Liaison); Louisa Lau (COPRAC Liaison); Patricia Lee (State Bar staff); Rodney Low (State Bar staff); Lauren McCurdy (State Bar staff); Kevin Mohr (Commission Consultant); Chris Munoz (Bar Association of San Francisco Liaison); Gerald Phillips; Ira Spiro (State Bar ADR Committee Liaison); Mary Viviano (State Bar staff); and Mary Yen (State Bar staff).

I. APPROVAL OF OPEN SESSION ACTION SUMMARY FROM OCTOBER 24-25, 2003 MEETING

At the request of staff, this item was carried over.

II. REMARKS OF CHAIR

A. Chair's Report

The Chair announced a special set discussion of item III.D. involving representatives from the State Bar's Certified Lawyer Referral Service Program.

B. Staff's Report

Staff led a brief discussion to finalize the work plan. Staff also discussed the proper use of the Commission's e-list, indicating that it is necessary to use a mail browser's "REPLY TO ALL" function in order to send a message. Alternatively, staff recommended that messages be sent to Felicia Soria, e-list administrator (felicia.soria@calbar.ca.gov), for distribution to the Commission e-list group.

III. MATTERS FOR ACTION

A. Consideration of Rule 1-400. Advertising and Solicitation

The Commission considered a proposed amended rule 1-400 (revised draft 5a) prepared by Mr. Mohr. Mr. George provided an overview of the proposal calling attention to the primary issue of whether the existing concepts of RPC 1-400 should be reorganized into separate rules along the lines of the ABA Model Rules. The Chair asked for comments on this general issue before proceeding to discuss the specifics of the proposed amended rule. Among the points raised during this discussion were the following:

(1) Adopting the ABA concept a "direct contact" standard would facilitate reorganizing RPC 1-400 into separate rules because the existing concept of "solicitation," which is confusing to many lawyers, could be deleted.

(2) Reorganizing RPC 1-400 into separate rules creates the potential problem of lawyers not finding the right rule. An advantage of California's current rule is one-stop shopping.

(3) Modern advertising, as well as the practice of law itself, is not geographically bound. This calls for uniformity in order to promote lawyer compliance. California's current rule was drafted in an era of uncertainty about the limits on state regulation imposed by commercial speech protection. Much of that uncertainty is gone and the rule no longer needs to hammer lawyers with definitions and specified standards. The Commission should consider following the ABA's separate rule format without undue concern about abandoning the terminology and structure found in RPC 1-400.

(4) If the current terminology is to be changed, then the Commission should strive to use terms as they are understood in their ordinary 'dictionary' meaning. New terms of art likely would not be any better that the existing terms of art in RPC 1-400.

(5) While the ABA format is a clear option, consideration should be given to starting with RPC 1-400(D), which is the heart of the current rule, and building-out from that concept. This would focus the rule(s) on the advertising issue that is of interest to most lawyers.

(6) If multiple separate rules are preferred then care should be taken to include appropriate cross-references to assist lawyers in finding the right rule.

Following discussion of the general issue of whether RPC 1-400 should be reorganized into separate rules, a vote was taken on a proposal that the codrafters be directed to pursue a separate rule approach. The vote was 8 yes, 1 no with 0 abstain.

Next, the Chair called for a discussion of the issue of whether and how definitions should be handled in the proposed new rules. Among the points raised during this discussion were the following:

(1) If there are to be advertising rule definitions that are separate from a global definition rule for the entire rules, then each separate advertising rule should have its own dedicated definitions section so that the rule is self-contained.

(2) An approach that uses separate definitions for each advertising rule would be format similar to current RPC 1-400 that has subparagraphs which relate to the separately defined terms of "communication" and "solicitation."

(3) The first task should be to draft the rule with a goal of simplicity and clarity. Only after that task is completed can there be a genuine assessment of whether definitions are needed. A well drafted rule may not need definitions.

(4) The codrafters current draft, Draft 5a, demonstrates the "closed universe" nature of the advertising regulations. Defined terms for these rules should not be placed in a global terminology rule.

(5) COPRAC opinions have relied on the definitions in RPC 1-400 to guide the proper application of the rule. Its hard to conceive a rule or rules that would not involve some terms requiring a precise definition.

Following this discussion, the following consensus votes were taken to guide the codrafters on issue of definitions:

1. Include definitions: 6 yes, 0 no, 3 abstain
2. Place definitions in a separate, global terminology rule: 3 yes, 5 no, 1 abstain
3. Include definitions for the terms used in the advertising rules as part of the advertising rules but in a single separate section (i.e., similar to the current structure of RPC 1-400): 5 yes, 3 no, 1 abstain
4. Include definitions but make them a part of each separate rule (i.e., a definitions section for the 'advertising rule,' another for the 'solicitation rule,' and another for the 'communications rule') 3 yes, 5 no, 1 abstain
5. Include a definition of the term "communication": 5 yes, 2 no, 3 abstain
6. Regarding the specific language in Draft 5a, approve definition but end at the phrase "...member's law firm" : 5 yes, 3 no, 0 abstain

The Chair indicated that discussion of this rule will continue at the next meeting.

B. Consideration of a "Practice of Law" Definition

Matter carried over to next meeting.

C. Consideration of Rules 1-700 (Member as Candidate for Judicial Office) and 1-710 (Member as Temporary Judge, Referee, or Court-Appointed Arbitrator)

The Commission considered a proposed amended rule 1-700 presented by Mr. Ruvolo. Attention was called to the proposed expansion of the rule to cover candidates for judicial appointment. Among the points raised during the discussion were the following.

(1) Although a judicial appointment process ordinarily is more confidential than a judicial election, both procedures are subject to abuse and the conduct of both classes of lawyer candidates should be subject to the same disciplinary standards. The original intent of RPC 1-700 was to level the playing field and the proposed expansion of the rule to cover candidates for judicial appointments is consistent with that public policy.

(2) In one sense, it appears that the primary conduct that ought to be regulated is that of the appointing authority; however, accountability nevertheless resides with the lawyer candidate to ensure that their conduct is proper. The proposed amended rule helps lawyer candidates by giving them a legal basis for objecting to questionable inquiries by appointing authorities.

(3) Consideration should be given to limiting the rule to Canon 5B of the Code of Judicial Ethics rather than the entirety of Canon 5.

(4) Proposed paragraph (B) should be clarified on the issue of when and how a candidate for appointment “announces” withdrawal from candidacy for appointment.

Following discussion, the Commission tentatively approved the proposed amended rule as modified in course of the discussion. The vote was 7 yes, 0 no, with 0 abstain. In taking this vote, it was understood that the codrafters were authorized to consider and implement the suggested modifications to: limit paragraph (A) to Canon 5B; and clarify paragraph (B) on the issue of withdrawal of candidacy for appointment. Discussion of proposed amendments to rule 1-710 was carried over to the next meeting. The text of proposed amended rule 1-700 as developed during the meeting is set forth below.

Proposed Amended Rule 1-700

Rule 1-700. **Member as Candidate for Judicial Office**

(A) A member who is a candidate for judicial office in California shall comply with Canon 5 of the Code of Judicial Ethics.

(B) For purposes of this rule, "candidate for judicial office" means a member seeking judicial office by election or appointment. The determination of when a member is a candidate for judicial office by election is defined in the terminology section of the California Code of Judicial Ethics. A member commences to become a candidate for judicial office by appointment at the time of first submission of an application or personal data questionnaire to the appointing authority. A member's duty to comply with paragraph (A) shall end when the member withdraws the member’s application or announces withdrawal of the member's candidacy or when the results of the election are final, whichever occurs first.

Discussion:

[1] Nothing in rule 1-700 shall be deemed to limit the applicability of any other rule or law.

D. Consideration of Rules: 1-300 (Unauthorized Practice of Law); 1-310 (Forming a Partnership With a Non-Lawyer); 1-320 (Financial Arrangements With Non-Lawyers); and 1-600 (Legal Service Programs)

The Commission considered a 12/1/03 memorandum from Mr. Tuft presenting a draft of a proposed new rule 1-310X encompassing some of the current RPCs related to attorney professional independence in a format that is similar to ABA Model Rules (i.e., MR 5.4). In addition, a definition of law firm and a draft Discussion section was included.

Visitors (Pat Lee, Rodney Low, and Mary Viviano) from the State Bar's Certified Lawyer Referral Service Program appeared and addressed the Commission concerning the issue sharing of legal fees with nonlawyers and the need for an express exception (in the rule text) for fee sharing between a lawyer and a State Bar certified lawyer referral service.

Mr. Tuft provided a brief overview of the provided materials. The Chair invited members to ask questions of the visitors and also invited the visitors to offer any comments not already reflected in the written materials. Among the points raised during the discussion were the following.

(1) The existing exception in RPC 1-320(A)(4) is important to the State Bar's Certified Lawyer Referral Service Program for several reasons: it affords clear notice to both providers and participating lawyers that such fee sharing is permissible; it protects the public by distinguishing certified from uncertified referral activities thereby furthering the regulatory intent of B&P Code §6155 and the Rules & Regulations Pertaining to Lawyer Referral Services as adopted by the State Bar Board of Governors and approved by the Supreme Court; and, by appearing as a dedicated RPC exception, it sets the conduct apart from other categories of lawyer fee sharing activities, such as the fee sharing addressed in *Chambers v. Kay*.

(2) There are various fees charged in a certified referral setting including: (1) a fee to join the panel; and (2) a forwarding fee (to support the operation of referral service) usually providing that when a panel attorney obtains a fee then that panel attorney must pay15% back to service. In the case of both of these fees, the referral service does nothing that could be regarded as interference with a panel attorney's independence of professional judgment and, as a result, no "sign-off" is sought from the client concerning the fee sharing.

(3) California is somewhat unique because it allows "for profit LRS" activities that may not be run by a local bar.

(4) Given the absence of interference, it is possible that if clients are asked, then they would not object to the fee sharing.

(5) If a referral agreement between practicing lawyers requires client consent as a public protection mechanism, then shouldn't the same public protection policy apply in the certified LRS setting?

(6) Consideration should be given as to whether a RPC change would be needed if the LRS Rules and Regulations are revised to impose some form of client notice or consent burden on the LRS, which between it and the panel attorney, has the first client contact.

Following this portion of the deliberations, a proposal to move the concept of existing RPC 1-320(A)(4) from proposed rule 1-310X Discussion section para. 4 to the rule text of 1-310X (possibly as 1-310X(a)(5)) passed by a vote of 7 yes, 0 no, and 2 abstain. The Chair then called for discussion of 1-310X(a)(1) and among the points raised during the discussion were the following.

(1) This part of the proposed rule would permit expressly"An agreement by a lawyer with the lawyer's firm or another lawyer in the firm may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons."

(2) The concept of "over a reasonable period of time" is too ambiguous as some cases can extend for many years.

(3) The use of a "reasonable" standard is intended to covey the fact that these estate matters can be very fact dependent.

(4) This language may have the inadvertent effect of precluding lump sum payments. The rule or the discussion should be amended to clarify application to lump sum payments.

(5) Given the *Chambers v. Kay* decision, do the estate payments covered by this exception actually represent a sharing of fees?

Following this portion of the deliberations, a consensus vote to approve paragraph (a)(1) of proposed rule 1-310X was passed by a vote of 5 yes, 4 no, and 1 abstain.

Next, a member raised a concern that the proposed rule title may be confusing to the extent that it references "professional independence" but is largely about fee sharing. The Chair called for a consensus vote to approve the title and the result was a split of 4 yes, 4 no, and 0 abstain.

The Chair then sought comments on the proposed rule Discussion section and while there was a consensus to move the language about LRS fee sharing to the rule text of 1-310X, there was further discussion focusing on revising the LRS exception to be contingent on client consent. Among the points raised were the following.

(1) Rule 17 of the LRS rules seems to provide certain specific regulations for the charging of various LRS fees. The existence of this standard suggests that a client consent requirement might be more appropriate as an LRS rule rather than a RPC. If an amendment to the RPCs is needed, then a provision could be added requiring compliance with the LRS rules.

(2) It is appropriate for lawyers to have duties imposed by the RPCs that are independent of the regulatory restraints imposed on a LRS entity. The primary consequence for a violation of a LRS rule is loss of certified status and this is not enough of a hook for assuring lawyer compliance.

(3) If the LRS fee sharing exception is to be burdened by a client consent requirement similar to the RPC 2-200 protocol, then consideration should be given to treating all of the proposed 1-310X exceptions in the same manner. Otherwise, a reasonable question arises as to the justification for singling-out the LRS exception?

(4) A client-consent requirement could undermine certified LRS activity and this, in turn, could have a detrimental impact on access.

(5) As a practical administrative matter, the LRS is in better position than a panel lawyer to comply with a requirement for written client consent. It would be anomalous to require a panel lawyer to seek a client consent, after the fact, for that lawyer's prior payment to join the LRS panel.

(6) Consideration should be given to expressly addressing the application of a consent requirement to fee sharing scenarios arising from sanctions or an award of costs.

(7) Consideration should be given to addressing permitted fee sharing in the insurance defense staff counsel setting (see *Gafcon*).

Following this discussion, a consensus vote was taken on a proposal to include the client consent requirement as an express condition for the LRS exception from the fee sharing prohibition. This proposal passed by a consensus vote of 5 yes, 4 no and 0 abstain. Next, the Chair then called for discussion of 1-310X(a)(2) and among the points raised during the discussion were the following.

(1) This part of proposed rule 1-310X is taken form the Model Rules and would provide that: "A lawyer or law firm purchasing the law practice of a lawyer who is deceased, or has a conservator or other person acting in a representative capacity, may, pursuant to the provisions of Rule 2-300 [Model Rule 1.17] pay to the estate or other representative of that lawyer the agreed-upon purchase price."

(2) In comparison, the current RPC 1-320(A)(2) language is broader than the ABA language used in 1-310X(a)(2).

(3) The deceased firm member scenario raises the law corporation issue of holding shares in trust. Consideration should be given to addressing this law corporation eligible shareholder concept in the rule 1-310X Discussion section.

Following this discussion, a consensus vote was taken on a proposal to approve proposed 1-310X(a)(2) with the understanding that the issues concerning law corporations and current RPC 1-320(A)(2) would be handled by the codrafters. This proposal passed by a consensus vote of 7 yes, 0 no, and 0 abstain. Next, the Chair

then called for discussion of proposed 1-310X(a)(3) and among the points raised during the discussion were the following.

(1) This part of the proposed rule would permit inclusion of ”nonlawyer employees in a compensation, or retirement plan even though the plan is based in whole or in part on a profit-sharing arrangement, provided such plan does not violate these rules or the State Bar Act.”

(2) There are substantive issues presented in the current RPC language. For example, what is the meaningful difference, if any, between the concepts of “profit sharing” and “compensation”?

(3) The current language could be tweaked provided the legislative history clarifies when changes are not intended to be substantive changes. For example, notations indicating that the Commission regards “compensation” as inclusive of “profit sharing” could be added to avoid misinterpretation of the change.

(4) Issues concerning the rule language might become less critical if proposed rule 1-310X incorporated the *Chambers v. Kay* test for a fee split test and/or the intro language for the exceptions clarified that “regardless of whether they constitute a fee sharing, the following are permitted. . . .”

(5) The policy of the exception seems appropriate for small firm and solo practitioners but the language to extend excludes non-employee contractors that ordinarily are used by small firms and solo practitioners.

(6) Consideration should be given to extending the exception beyond employees so long as that exception is conditioned on client consent.

Following the discussion of 1-310X(a)(3), the Chair asked the codrafters to attempt to incorporate the concerns raised in the next redraft. In addition, Mr. Lamport was asked to assist the codrafters in attempting to incorporate the *Chambers v. Kay* test. Next, the Chair then called for discussion of proposed 1-310X(a)(4) and among the points raised during the discussion were the following.

(1) This part of the proposed rule is taken from the ABA and has no RPC counterpart. It would permit a lawyer to “share court-awarded legal fees with a non-profit organization that employed, retained or recommended employment of the lawyer in the matter.”

(2) The intent of this exception is laudable as it is supportive of lawyers’ efforts to assist public interest activities; however, there is a risk of abuse where a lawyer creates an entity and uses it as an alter ego.

(3) If this exception is intended to permit a lawyer to reimburse a client entity for fee payments paid prior to an award of fees, then it is questionable whether in such circumstances there is a fee split at all.

(4) The ABA added this provision to advance the work of non-profit organizations (see ABA Formal Opn. 93-374).

(5) In one sense, the actual abuse that occurs takes the form of illegal tax deductions taken by a lawyer who sets up an alter ego entity.

(6) If the proposed exception is helpful to lawyers presently engaging in conduct that might otherwise be criticized as a RPC violation, then consideration should be given to modifying the language to close the loophole for abuse. For example, the exception could be reworded to be inapplicable to representations where a lawyer has an ownership interest in the non-profit.

(7) The proposed fix may not work in situations where a lawyer has an ownership interest in a 'bona fide' non-profit entity or is a member of the entity.

(8) The benefits of the exception outweigh any deficits. The limited focus here is that the lawyer maintain the independence of judgment as required in the rule. It is possible that the potential abuses can be addressed by enforcement of other applicable rules, such as conflicts rules.

(9) There are mutual benefit non-profit entities and there are public benefit non-profit entities and they are the ones that should be referred to in the rule.

Following this discussion, a consensus vote on a proposal to approve proposed 1-310X(a)(4) passed by a vote of 5 yes, 1 no, and 1 abstain. The Chair indicated that further discussion of proposed rule 1-310X would continue at the Commission's next meeting.

E. Consideration of Rule 3-600. Organization as Client

The Commission considered a 11/28/03 memorandum from Mr. Melchior presenting comments on a revised chart prepared by Mr. Mohr. The Chair asked the codrafters to present issues by going row-by-row through the chart. Among the points raised in the course of the discussion were the following.

(1) Consideration should be given to adding discussion section language to clarify that the duty in paragraph (B) is applicable regardless of how, or from whom, the lawyer's information was learned, or whether it relates to the lawyer's specific engagement.

(2) The proposed clarification seems to expand unnecessarily the scope of the rule to address an issue that is essentially a complex duty of confidentiality issue not limited to the context of organizational representations.

(3) The general thrust of the entire rule presupposes a present attorney-client relationship with the organization. Issues arising after the lawyer's representation is terminated should not muddy the guidance that the rule must give to a lawyer who is presently representing the organization.

(4) Regarding row #8 of the chart (re the phrase "actual or apparent agent of the organization"), the Commission previously determined to track the ABA in the rule text with clarification in the Discussion section.

(5) Regarding row 11 of the chart (re the phrase "that is or may be a violation of law"), the concept of "that is" is more objective than "may be."

(6) Although it might be less objective, the concept of "may be" adds client protection because it promotes affirmative lawyer action that errs on the side of accountability.

(7) Resolution of this seemingly small issue actually has a larger impact when you consider the issue in the context of the bigger debate on whether rule 3-600 should be amended to provide for permissive outside reporting. If the position is that outside reporting should not be allowed, then the 'trigger' for up-the-ladder internal reporting should be broadened beyond the existing standard to reflect a good faith effort to appreciate the concerns that have prompted permissive outside reporting innovations by Congress and the ABA.

Following this discussion, a consensus vote on a proposal to retain the existing RPC 3-600(B) phrase "that is or may be a violation of law. . . ." The vote revealed a spit of 4 yes, 4 no, and 0 abstain. The Chair indicated that further discussion of proposed amended rule 3-600 would continue at the Commission's next meeting.

F. Consideration of Rule 1-500. Agreements Restricting a Member's Practice

The Commission considered a 12/1/03 memorandum from Ms. Foy and Mr. Sapiro presenting a revised draft of a proposed amended rule 1-500 and a recommendation to move the concept of RPC 1-500(B) to proposed amended rule 1-120. Among the points raised in the course of the discussion were the following.

(1) The exception permitting restrictions in connection with retirement is provided for in case law.

(2) Consideration should be given to addressing the issue of restrictive agreements that are used for tactical conflicts of interest.

(3) The concept of current RPC 1-500(B) should be maintained and, if it is moved to another rule, then consideration should be given to including a cross reference in the Discussion of the amended 1-500.

(4) The concept of current RPC 1-500(B) might be appropriate as a separate, stand alone rule, or it could be included as part of RPC 1-120.

(5) Its not clear that the concept of current RPC 1-500(B) really needs to be moved. The Commission should first reach some tentative consensus on the rest of 1-500 before deciding whether paragraph (B) might be viewed as 'out of place.'

(6) The concept of current RPC 1-500(B) is broader than its State Bar Act counterpart and, on that basis, should be retained in the rules to be consistent with the views of some members that the eventual new rules might obviate the need for maintaining the similar statutory provisions.

(7) Might the retirement exception be subject to abuse as a loophole in the general prohibition? Consideration should be given to clarifying the concept of retirement for purposes of this rule.

(8) There also is a concern that retired lawyers should be able to continue to do pro bono work without placing themselves outside of the retirement exception.

(9) The ABA annotations on MR 5.6 may be helpful on clarifying the retirement scenario.

Following this discussion, the following drafting matters were handled by consensus votes:

1. In proposed paragraph (A), keep the retirement concept and add phrase ". . . from the practice of law": 8 yes, 0 no, 1 abstain
2. In concept, move current RPC 1-500(B) to another rule (possibly rule 1-120): 7 yes, 0 no, 0 abstain

The Chair asked the codrafters to prepare a redraft for the next meeting and specifically asked all members to send e-mails to the codrafters on any issues or comments concerning the proposed Discussion section.